Filed 1/29/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LOUIS ELMO BARNES, JR., Defendant and Appellant.	2d Crim. No. B148430 (Super. Ct. No. 1030633) (Santa Barbara County)

A jury found appellant Louis Elmo Barnes guilty of two counts of first-degree residential burglary (counts 1 and 3) and two counts of receiving stolen property. (Pen. Code, §§ 459 and 496, subd. (a).)[1] He was sentenced to 62 years to life in state prison under California's Three Strikes law. The trial court found true two prior conviction allegations. (§§ 667, subd. (e)(2)(A) and 1170.12, subd. (c)(2)(A).) It imposed consecutive five-year enhancements on counts 1 and 3 plus consecutive one-year enhancements on both counts. (§§ 667, subd. (a)(1) and 667.5, subd. (b).) The sentence for receiving stolen property was stayed pursuant to section 654. Appellant argues that his convictions on counts 1 and 3 must be reversed for insufficient evidence, the trial court erred by instructing the jury with CALJIC No. 2.15, the court abused its

[1] All further statutory references are to the Penal Code.

discretion in refusing to strike one of his prior strike convictions, and his consecutive life sentences constitute cruel and unusual punishment. We reject his contentions and affirm.

FACTS

Prosecution

1) Koonrad Burglary

On February 8, 2000, Steven and Maryann Koonrad, along with their adult daughter, left their home at approximately 7:30 p.m. They returned two and a half to three hours later. A police car was parked outside their house and an officer told them they had been burglarized.

At approximately 9:00 p.m. on the same evening, parole agents Tom Vandermolen and Bob Bernaugh were at a gas station in Lompoc. They were in their cars, carrying on a conversation through their open windows. Vandermolen noticed appellant riding a bicycle up a driveway that lead into the gas station. Appellant glanced at Vandermolen, looked startled and turned around and rode off. Both Vandermolen and Burnaugh followed him in their separate cars. Vandermolen saw appellant remove a backpack and drop it into a dumpster. He recognized appellant as one of his former parolees. Vandermolen radioed Burnaugh to follow appellant and then broadcast his general description to the police department. The pursuit ended when appellant rode into an apartment complex and was lost from view. Vandermolen returned to the dumpster and retrieved the backpack. It contained a variety of jewelry and a set of dog tags imprinted with the name of the Koonrads' daughter.

The Lompoc Police Department ran a "utilities check" on the daughter's name and found the Koonrads' address. An officer visited their residence and entered the house through an open back door. Two of the bedrooms had been ransacked. Dresser drawers had been pulled out and dumped on the beds and their contents thrown to the ground. When the Koonrads returned home, the officers showed them the items found in the backpack. It contained jewelry that was missing from the Koonrad home.

2) Meeder Burglary

On February 24, 2000, Gordon Meeder came home for lunch. He saw a black bicycle in the hallway and heard a bedroom door close. Meeder noticed that the molding was broken around the front door and called 911. The window in the master bedroom was open and the screen was missing. A jewelry box was open and its contents were spread out on the bed. A fingerprint was lifted from the Meeder residence, but was not sufficiently clear to make an identification.

Several hours after the burglary, Vandermolen and Burnaugh drove to the apartment complex where appellant had disappeared during the February 8 pursuit. At approximately 4:30 p.m. in the afternoon they saw appellant round a corner and walk towards them. Vandermolen got out of the car and attempted to grab appellant. As he did so, appellant pulled back, put his right hand into his pocket and threw a leather pouch onto the ground. He was arrested. The pouch contained numerous items of jewelry that Mrs. Meeder later identified as her property.

Defense

Appellant did not testify at trial or present an affirmative defense.

DISCUSSION

Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence supporting his convictions for burglary. He argues that he was not seen on the premises of either home, no useable prints were found and there was conflicting testimony concerning the descriptions of the bicycles. Although the Koonrads' neighbors had seen a suspicious man in the neighborhood, he did not match appellant's description. There was no evidence indicating how appellant had entered the homes nor was he found in possession of tools used to effect a burglary.

On appeal we determine whether there is substantial evidence to support appellant's conviction for burglary. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) """Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.""" (*People v. Stanley* (1995) 10 Cal.4th 764,

793.) Every person who enters any house with intent to commit grand or petit larceny or any felony is guilty of first-degree burglary. (§ 459.) To convict a defendant of first-degree burglary, the People must prove "1. A person entered a building; and 2. At the time of the entry, that person had the specific intent to steal and take away someone else's property, and intended to deprive the owner permanently of that property." (CALJIC Nos. 14.50 [Burglary Defined] and 14.51 [First and Second Degree Burglary-Defined].)

A short time after the Koonrads had left their home, appellant was seen at a gas station by his parole agent. Appellant looked surprised and rode away on his bicycle. While being followed, he removed a backpack and dropped it into a dumpster. The backpack contained dog tags belonging to the Koonrads' daughter. When the police visited the Koonrads' home they found that it had been ransacked. The Koonrads identified jewelry found in the backpack as their property.

When Meeder returned home for lunch, he saw a strange bicycle in the hallway, heard a door close and noticed that the front door frame had been split. The upstairs bedroom had been ransacked. Jewelry was spread out on the bed and the window was wide open. Later that day, appellant was apprehended. In his possession were pieces of jewelry belonging to Mrs. Meeder. This was sufficient evidence that appellant entered the houses with the specific intent to steal and permanently deprive the Koonrads and Meeders of their property.

There was a discrepancy in the description of the bicycle appellant was seen riding and the bicycle found in the Meeders' hallway. An officer testified that Vandermolen referred to the bicycle as a beach cruiser when he provided appellant's physical description. The police, however, did not include a description of the bike in their look-out bulletin. At trial, Vandermolen testified that the bike was a ten speed. Appellant contends that, since a beach cruiser (rather than a 10-speed) was found at the Meeder's house, the evidence fails to connect him to the crime. We disagree. The evidence is equally susceptible of the interpretation that appellant used two different bicycles to effect the burglaries. The beach cruiser did not belong to the Meeders. There was no evidence that the bicycle found in the Meeder home was the same bicycle

appellant had ridden after the Koonrad burglary. The presence of any type of bicycle creates an inference that appellant entered the Meeder home with an intent to steal and carry away their possessions.

Instructional Error

Appellant argues that the trial court erroneously instructed the jury with CALJIC No. 2.15. He claims that it lessened the prosecution's burden to prove the elements of burglary beyond a reasonable doubt. CALJIC No. 2.15[2] allows a jury to infer that a defendant is guilty of burglary or receiving stolen property when he is found in possession of stolen property and there is corroborating evidence of guilt. "However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt." Such evidence includes consideration of the time, place and manner of the defendant's possession, whether he had an opportunity to commit the charged offense and his conduct or other evidence which tends to connect him with the crime. (CALJIC No. 2.15.) Appellant objects to the language in the instruction allowing the jury to infer guilt on the basis of "slight" corroborating evidence. He contends that such evidence, standing alone, could have allowed the jury to find him guilty of burglary based only on the fact that he was in possession of stolen property.

CALJIC No. 2.15 "is a permissive, cautionary instruction which inures to a criminal defendant's benefit by warning the jury not to infer guilt merely from a defendant's conscious possession of recently stolen goods, without at least some corroborating evidence tending to show the defendant's guilt." (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1174; see *People v. Johnson* (1993) 6 Cal.4th 1, 35; *People v. Holt*

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[2] CALJIC No. 2.15 provides, "If you find that a defendant was in conscious possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant [] is guilty of the crimes of Burglary and/or Receiving Stolen Property. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. *However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt.* [¶] As corroboration, you may consider the attributes of possession—time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, or any other evidence which tends to connect the defendant with the crime charged." (Italics added.)

(1997) 15 Cal.4th 619, 677.) "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt." (*People v. McFarland* (1962) 58 Cal.2d 748, 754.) An inference of guilt is justified when recently stolen property is found in the conscious possession of a defendant and the possession is not explained. (*Id.* at p. 755.)

The constitutionality of CALJIC No. 2.15 has been upheld where there was sufficient corroborating evidence to allow the jury to find that a defendant possessed stolen property and had an intent to steal. (*People v. Smithey* (1999) 20 Cal.4th 936, 977.) A permissive presumption does not shift the burden of proof because it leaves the trier of fact free to credit or reject the inference. The reasonable doubt standard is affected "only if, under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157 .)

Appellant cites *U.S. v. Gray* (5th Cir. 1980) 626 F.2d 494, 500 in support of his argument. There, a trial court instructed that only "slight" evidence was necessary to establish a defendant's participation in a conspiracy. The instruction was reversible error because the instruction "suffocated" the reasonable doubt standard.

Appellant's reliance on *Gray* is misplaced. It did not address the constitutionality of CALJIC No. 2.15 nor did it involve a theft crime. Here, the issue before the jury was whether an inference of guilt could be drawn (that appellant committed a burglary) based on the presence of existing evidence (his possession of stolen property). There was substantial evidence to support an inference of appellant's guilt.

Several hours after the burglary of the Koonrad home, appellant was found in possession of their jewelry. He acted suspiciously when he saw Vandermolen, fled on a bicycle and discarded the evidence in a dumpster. Appellant was apprehended on the same day as the Meeder burglary. As he was arrested, he threw a pouch of jewelry to the ground. The jewelry was later found to belong to the Meeders. A bicycle was found in

the Meeder's hallway which did not belong to them. The corroborating evidence was sufficient to support the jury's finding of guilt.

Jury instructions are not considered in isolation. Whether they are correct or adequate is determined by consideration of the entire charge to the jury. (*People v. Holt, supra,* 15 Cal.4th at p. 677.) The jury was instructed with the elements of the charged crimes and the burden of proof. It is unlikely that they interpreted CALJIC 2.15 to lower the prosecution's burden of proving appellant's guilt beyond a reasonable doubt.

Romero Motion

Appellant contends the trial court abused its discretion by refusing to strike at least one of his prior convictions. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) On appeal, he argues that his criminal history is attributable to his substance abuse, father's heroin addiction and an unstable home life. Appellant contends that these factors, combined with the nonviolent nature of his offenses, place him outside the spirit of the Three Strikes law.

Trial courts have limited discretion under section 1385 to strike prior conviction allegations in Three Strike cases. (*People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 530.) The trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

To establish an abuse of discretion, the defendant must show that the sentencing decision was irrational or arbitrary. "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.)

Appellant's strike offenses were based on a 1973 conviction for first degree robbery and a 1987 conviction for residential burglary. He was convicted in 1978 and 1981 for commercial burglary and he had a 1993 conviction for auto theft. The trial court stated that it chose not to exercise its discretion to strike a prior conviction. It noted that appellant had an extensive criminal history which dated back to his juvenile record in 1967. The trial court acted well within its discretion in refusing to strike his prior convictions.

Claim of Cruel and Unusual Punishment

Appellant argues that 62 years to life sentence is cruel and unusual punishment under the state and federal Constitutions. Under the California Constitution, a punishment may be cruel and unusual if it is so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity." (Cal. Const., art. I, § 17; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478.)

When analyzing a claim of disproportionality under the state Constitution, we examine (1) the nature of the offense and offender, (2) the sentence compared to sentences for more serious offenses in California, and (3) the sentence compared to sentences for the same offense in other states. (*In re Lynch, supra,* 8 Cal.3d at pp. 425-427.)

Appellant's sentence is constitutional under *Lynch.* It is reasonably proportional to the offense and the offender. The severity of the sentence is due to appellant's prior convictions under the Three Strikes law and general recidivist history. Imposition of a third strike is justified where defendant's conduct shows an "almost unrelenting pattern of criminal conduct." (*People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1094.) Appellant's sentence conforms to sentences for repeat offenders under the Three Strikes law and is also proportional to sentences for repeat offenders in other states. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1513-1516.)

Nor does appellant's sentence violate the Eighth Amendment. (U.S. Const., 8th Amend.) Under federal law, recidivism justifies the imposition of longer sentences

for recidivists. (*Parke v. Raley* (1992) 506 U.S. 20, 27; *Rummel v. Estelle* (1980) 445 U.S. 263, 284.) Appellant argues that his sentence is disproportional under the recent holding in *Andrade v. Attorney General of State of California* (2001) 270 F.3d 743, 765-766.) There, the Ninth Circuit concluded that a defendant's Three Strikes sentence of 25 years to life was grossly disproportionate to his conviction for petty theft with a prior. Unlike the defendant in *Andrade,* appellant is a violent recidivist. One of his prior strike offenses was a robbery conviction. On this record, appellant's sentence did not constitute cruel or unusual punishment.

The judgment is affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Timothy J. Staffel, Judge

Superior Court County of Santa Barbara

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